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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

HOLY SPIRIT BYELORUSSIAN AUTOCEPHALIC ORTHODOX CHURCH, et al,

Petitioner,

-vs-

REV. VASIL KENDYSH, et al.

Respondents.

Petition for Writ of Certiorari
to the U.S. Court of Appeals
For the Sixth Circuit

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ISSUES

Did the lower courts, trial and appellate, violate the property rights and constitutional rights of the local church of due process?

Did the lower courts improperly invade the religious rights of the local church?

Is the failure to object the same as a positive action, such as a vote or referendum?

Can a local church be hierarchical in doctrine, but congregational concerning real property and administration?

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this honorable Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, in this cause.

OPINIONS BELOW

The Sixth Circuit Court of Appeals affirmed the judgment of the trial court and its opinion is hereto attached as Appendix A.

The judgment of the trial court is attached as Appendix B.

JURISDICTION

The Supreme Court of the United States has jurisdiction in cases involving violations of the 1st and 14th Amendments to the U.S. Constitution.

The instant case involves allegations of such violations, namely, of due process and of unwarranted interference into the property rights of a religious group.

The Supreme Court's attention to a refinement of legal principles which purport to govern such situations is urgently needed in order to clarify constitutional rights of religious groups.

This is the first of several similar cases to reach this judicial level.

STATEMENT OF FACTS

The respondent herein is Reverend Vasil Kendysh, Secretary of the Consistory of BAOC, which stands for the Byelorussian Autocephalic Orthodox Church.

The Consistory is an intermediate administrative office of BAOC.

The petitioner is the defendant in lower court proceedings, and is the Holy Spirit Church. It is located in East Detroit, Michigan and was organized as an ecclestiastical corporation under Michigan law on May 10, 1971.

The principal office of the petitioner is in East Detroit, Michigan. Defendant Bayzli Pleaskacz is the secretary of the petitioner local church.

The spiritual leader of the petitioner is Archbishop Mikalay, or Mikalay Maciukievic.

The leaders of the respondent's group are the plaintiff, Rev. Vasil Kendysh and Bishop Ivan Brudsky.

The consecration of Rev. Brudsky as Bishop is objected to by the respondents. (TR Vol. page 80, 4 to 25).

In 1967 The respondent began as a fellowship of like-minded persons, who conducted religious services in their own homes until they had a church.

In 1971 the respondents purchased a church building for $25,000, which money had been raised through contributions. (Deft Ex. C and D are the deeds in the real estate transactions).

The Articles of Incorporation were signed by witnesses Pleskacs, Sazyck and Bakunovich. (Deft. Ex. b).

BAOC held its second convention on May 28, 1972. Prior to that date the respondent sent notices to the parishes for

the convention. Also, prior to that date the petitioner had adopted bylaws in which paragraphs 18 and 20 related to the retention of interest in real estate by the petitioner. (Deft. Ex. B).

Testimony at the trial in the lower court related to the adoption of a "Statute and it was offered into evidence at trial over the objection of defense counsel, which was to have been circulated among the local parishes and sought to be approved in a referendum.

Bishop Brudsky testified that he believed that the Statute had been adopted because he never heard of any objections to it. (TR Vol. 2, p. 30, line 21).

Witness Bakunovich testified that the Statute never passed and that there was no referendum. (TR Vol. 2, pages 86 and 87).

Bishop Mikalay does not recognize

the Statute. (TR Vol. 3, page 30, line 15).

Witness Sazyc testified that money to buy the realty was raised by donations from the original founders and members, (TR Vol. 3, page 52, line 23). He also testified that the realty is free and clear of any mortgages at this time. (TR Vol. 3, page 52, line 1). Also, he stated that contributions had been made by the petitioner to respondent, but not vice versa, and that the local church had never received any financial support from the BAOC. (TR Vol. 3, page 55, lines 13 and 17).

The trial court found for the respondent, and the appellate court affirmed that judgment.

ARGUMENT

It is the view of the petitioner that the courts cannot intervene into religious matters to decide who is "schismatic" and who is not. Yet the appellate court insisted on calling the petitioners schismatics. By what authority?

The court used the analogy of the Pope to the case of the Primate. This was most illogical. The Pope is the elected head of a church which is 2000 years old. The instant local church was initiated in 1967. The second convention was in 1972 and the break occurred in 1981.

During those nine years the local church was, at the most, a prospective member, not a real member of the BAOC.

The Statute was supposed to have been approved by referendum, by vote. It was not, and the courts have no right to take the absence of protest as approval.

Bishop Brudsky testified that he believed the Statute had been adopted because he never heard that any parish had any objection to it. This is approval? This is a vote? (TR Vol. 2, page 29, l. 16 and page 30, line 2).

There was no vote. The members did not exercise their voices. There was no referendum. There should have been one. There still should be one, ordered by this court.

Reliance on a "presumptively valid" approval is falacious and unfair, and the court should not have indulged in such manipulation.

The local church operated on the same basis, before, during and after the convention of 1972 and received not one dime of financial assistance from the BAOC.

A normal transfer of realty requires a properly executed and delivered deed, witnessed by two persons, and properly notarized. This did not happen here.

Reverse logic was exercised by the lower courts. One can see where the power of realty accrues to the BAOC if the Statute had been approved by referendum, but to presume the passage of such power without basis in fact is outrageous. It is a violation of due process, and of the constitutional rights of the members of the local church. This is analagous to granting the power of citizenship to an alien, including the right to vote, without having performed the prerequisits, including the obtaining of a certificate of naturalization.

It is like approving the actions of a driver who owns a car, has driven for years, but who, regretably, just doesn't have a driver's license.

The lower just simply wanted to rule as it did, stating that "if the Court declared the Statute to be invalid, it would destroy the centerpiece of the

BAOC." (Judgment of Court, page 17).

This was not the business of the court. It should not have decided who were the schismatics and who were not. It should not have intervned to supply what was lacking.

In Presbyterian Church in the U.S. v. Mary Eliabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 21 L.Ed. 658, 89 S.CT. 601 (1969), the Court held that the First Amendment through the Fourteenth Amendments prohibit civil courts from awarding church property on the basis of the court's interpretation of church doctrine. Civil courts have no role in determining ecclesiastical questions in the process of resolving property disputes.

In the instant case there was an attempt to create a new Statute. There was no old one.

Take the case of the U.S. Constitution

itself. The Court can take judicial notice of the fact that a proposed Amendment can be passed by both Houses, but must be referred to the States for approval by referendum. This process, of referendum, is sacred to the very core of the Constitution, and should have been respected by the lower courts in this case.

The finding that the Statute herein is presumptively valid is gross error. The relationship is not sufficient enough to warrant such an intrusion into religion as happened herein.

The lower courts found that "a civil court must defer to the decisions of the ecclesiastical tribunals of a hierarchical church on matters of polity and administration. What ecclesiastical tribunals pronounced the validity of the Statute in this case? We have only the

bsld assertion of the respondent theat the relationship created the authority to take the realty, while acknowledging that the Statute had not been adopted by vote, as it should have been.

Has the time come, in America, that a court can interfere with a nudge and a shove and create consent where none in fact exists? This is similar to the case where a hustler writes to a person, claiming One hundred hundred thousand dollars, and then sues on the basis of silence. "I win because he failed to answer my unsolicited letter," claims the hustler.

In Ginossi v. Samatos, 3 Ill. App. 2d 514, 123 NE 2d 104 (1954), and in St. John's Greek Catholic HRO Church v. Fedak, 96 NJ Syper 556, 233 A 2d 663, the trial courts recognized the need for a local church to adhere to its hierarchical parent in doctrine, it may, in certain situations, retain control of its own

property. Such a situation is the one at bar.

The Appellate Court cited the case of Serbian Orthodox Diocese v. Milivojevish, 426 US 696 (1976), that "to attempt to adjudge the validity of a religious organization's self-proclaimed constitution would thrust the court into the midst of a dispute regarding church polity and administration. Serbian Orthodox Diocese teaches that we should avoid such a result." Yet, the court did the opposite of what it recited. It did find the Statute to be presumptively valid. (See page 5 of the Appellate Court's decision).

The Appellate Court did make a finding and did, then, build on it to injure those who built and invested in the realty.

The negative logic used by both the trial and appellate courts is expressed clearly on page 6 of the appellate court's decision: "...the Church has provided no

evidence that, at or following the time of its enactment, it ever expressed the intent that it should not be bound by the Statute's property provisions."

What do the courts mean by "enactment?" Each parish was entitled to act or not act on the question of the referendum. This is a specific condition subsequent. That condition was not satisfied. Therefore the Statute was not "enacted." It was not adopted by the local hurch.

It would be revealing to learn just which local churches did have a referendum. What if some had the vote and others did not. How valid is the Statute then?

The issue of the Statute is larger than this one case. The respondent seeks to establish its control not on the basis of democratic principles but rather on the tyrannical force of confiscation..on the same kind of issue which prompted our

forefathers to seek independence.

This High Court should reverse rhe decisions of the lower courts herein and should restore the parties to where they were. At least the Court should order a court administered vote so that the voice of the people that count may be heard, namely, the parishioners, those who invested their loyalty, time, effort and money in their religious cause.

CONCLUSION

Without a basis in fact the lower courts jumped to the conclusion that the Statute was valid. This was an unwarranted intrusion into the religion and the property rights of the petitioner,violating its constitional rights, without due process. A referendum should have been held, and still should be held, in fairness and justice.

CERTIFICATE OF

SERVICE

Respondent will take notice of the filing of this Petition for Certiorari and that the same will be heard pursuant to the convenience of the Court.

Three copies were mailed by ordinary mail, first class, this 17th day of October, 1988, to Gary Price, Esq., the attorney for respondent, to 4720 E. F-41, Oscoda, Michigan, 48750.

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NOT FOR PUBLICATION

(Filed July 6, 1988)
(Leonard Green, Clerk)

NO. 87-1637

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REVEREND VASIL KENDYSH, et al., Plaintiffs-Appellees, v. HOLY SPIRIT BYELORUSSIAN AUTOCEPHALIC ORTHODOX CHURCH, Defendants-Appellants.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Decided and Filed _____

Before: KEITH and WELLFORD, Circuit Judges; and HORTON,* District Judge

* The Honorable Odell Horton, Chief United States District Judge for the Western District of Tennessee, sitting by designation.

PER CURIAM: This appeal presents difficult questions raised by a dispute within a hierarchical church over the ownership of church property. The central administrative adjudicatory of the Byelorussian Autocephalic Orthodox Church ("the BAOC") sued to gain control over church property held by a seceding local parish in Michigan, the Holy Spirit Church. The district court entered judgment for the plaintiff central church. We affirm based essentially on the analysis contained in the district court's extensive memorandum opinion.

Plaintiff Reverend Vasil Kendysh is Secretary of the Consistory of the BAOC, a self-governing church adhering to the tenets, cannons, doctrine and traditions of the Holy Ecumenical Apostolic Orthodox Church. In form the BAOC has a hierarchial

polity with a multitier system of judicatories, of which the chief ecclesiastical judicatory is the Council of Bishops. See Presbyterian Church v. Hull Church, 393 U.S. 440 (1969), for a discussion and definition of a "hierarchical church." The Consistory is an intermediate administrative ecclesiastical judicatory with authority to supervise parishes, to intercede on behalf of the interests of the denomination, and to assume control over and title to any parish property in the event of secession or schism by a parish.

The defendant Holy Spirit Church, which was organized as an ecclesiastical corporation under Michigan law in 1971, was a parish of the BAOC during the time leading up to the dispute which is the subject matter of this suit. The organizers of the Holy

Spirit Church bought a church building in 1971 with money raised through member contributions. The title to the church building and the rectory subsequently purchased by the Church is in the name of the Holy Spirit Church.

In 1972 the BAOC held a General Convention in New Jersey. Two parishoners of the Holy Spirit Church attended the convention. At the convention, the gathered delegates voted to adopt, in principle, the draft form of a new constitution for the BAOC, referred to as "the Statute." It was anticipated that after revisions of the document were completed a referendum would be held for final ratification of the Statute. Instead, the final version of the Statute, when completed, was sent to parishes of the BAOC prior to January 1, 1976, on which date, according to its own terms, the

Statute was effectively promulgated and in force. No referendum was conducted, but none of the parishes voiced any objections to the final version of the Statute. The Statute provides that upon its enactment "all local statutes of Parishes and Dioceses are cancelled and lose their validity."

During the 1970s the Holy Spirit Church conducted itself as a parish of the BAOC by, for example, making dues payments and administrative reports to the Consistory, and the Church s Bylaws recognized the authority of the BAOC with regard to several matters, including the appointment of priests and the liquidation of the parish. While these factors demonstrate that the Holy Spirit Church submitted itself to the hierarchy of the BAOC, the Bylaws of the Church contained provisions indicating an inconsistent

intent to retain control over the Church's property in the hands of the local church. By contrast, the Statute of the BAOC provides that in the event of liquidation of a parish, which can occur only with the consent and order of the Consistory, "... any and all property that has been under the authority of said ... Parish, automatically comes under the direct authority of the Consistory as property of the BAOC."

The discontent of the Holy Spirit Church with the BAOC hierarchy apparently originated in 1978, when the BAOC, which previously had functioned as one diocese, split into the American and Canadian dioceses. As a result of this division, the Holy Spirit Church fell under the authority of the Primate[1] Andrew, who became the governing bishop of the American diocese.

1. The primate is the elected head of the BAOC, a position analogous to that of the Pope in the Roman Catholic Church.

In October 1980, the Holy Spirit Church requested Archbishop Mikalay, the governing bishop of the Canadian diocese, to take the parish under his control, which he did. In September 1981, the Holy Spirit Church effectively announced its renunciation of the BAOC s hierarchy by sending a declaration to the Primate stating that it did not consider itself bound by decisions of the Council of Bishops and that instead the parish considered Mikalay its spiritual and administrative leader.

Following this schism, Reverend Kendysh brought suit in district court against the Holy Spirit Church, asserting that the property held by the Holy Spirit Church was in fact the property of the BAOC pursuant to the Statute. Following a bench trial, the district court entered

an order enjoining the Holy Spirit Church from transferring the property in question and ordering the Church to assign the property, including a bank account, to Kendysh in his official capacity.

In its memorandum opinion, the district court carefully and thoroughly detailed its factual findings and conclusions of law in the case. The court addressed itself to two primary issues: (1) whether the Statute of the BAOC was valid and binding, and (2) if so, whether the Holy Spirit Church was a part of the BAOC hierarchy prior to the 1980 schism and thus was bound by the Statute's property control provisions. The district court resolved both of these issues in the affirmative, and in favor of plaintiffs.

The district court based its conclusion that the Statute of the BAOC should be deemed

or presumed valid on the Supreme Court's reasoning in Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), which held that a civil court must defer to the decisions of the ecclesiastical tribunals of the hierarchical church on matters of church polity and administration. We believe, as the district court found, that to attempt to adjudge the validity of a religious organization's self-proclaimed constitution would thrust the court into the midst of a dispute regarding church polity and administration. Serbian Orthodox Diocese teaches that we should avoid just such a result. See 426 U.S. at 710. We therefore find that the district court's deference to the BAOC's assertion of the Statute's validity was proper for the reasons articulated at length by the district court.

After concluding that the Statute was presumptively valid, the district court proceeded to determine that a preponderance of the evidence showed that the Holy Spirit Church was part of the BAOC hierarchy prior to the 1980 schism. We believe that the evidence of record and the Michigan precedent considered by the district court support the court's conclusion in this regard. We find no error in the findings of fact made in this respect. Having found that the Holy Spirit Church was part of the BAOC hierarchy and therefore bound by the terms of the Statute, the district court applied the "neutral principles of law" approach to settling church property disputes and concluded that the provisions of the Statute vesting all parish property in the BAOC were controlling. Since the district court's opinion reflects a well-

considered and proper application of Supreme Court precedent establishing the neutral principles of law approach as an appropriate means of ensuring that church property disputes be settled pursuant to the objectively expressed intent of the church membership, we affirm that decision. See Jones v. Wolf, 443 U.S. 595 (1979); Presbyterian Church v. Hull Church, 393 U.S. 440 (1969). Although the Holy Spirit Church argues that its Bylaws, enacted in 1971, reflect its intent to retain autonomous control over its property, the Church has provided no evidence that, at or following the time of the Statute's enactment, it ever expressed the intent that it should not be bound by the Statute's property provisions, or that it opposed the Statute's application to local churches and their property. As the district court noted, once a local parish submits itself to the

authority of a central hierarchical church, provisions in the central church's constitution override inconsistent provisions in the local church's articles of association. See Second Protestant Reformed Church v. Blankespoor, 350 Mich. 347, 86 N.W.2d 301 (1957).

In sum, for the reasons articulated by the district court's opinion, and for the reasons herein summarized, we conclude that the district court's decision that the BAOC owned the parish property has not been demonstrated to be erroneous. Accordingly, we affirm the district court's judgment for plaintiff Kendysh.

(Filing Date: June 18, 1987)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REV. VASIL KENDYSH, Secretary of the Consistory of the Byelorussian Autocephalous Orthodox Church, individually and as such officer and representative of the members of said denomination,

Plaintiff

Civil Action No. 83-1906

v.

HON. JULIAN ABELE COOK, JR.

HOLY SPIRIT BYELORUSSIAN AUTOCEPHALIC ORTHODOX CHURCH, a Michigan Corporation, BAZYLI PLESKACZ, and MANUFACTURER'S NATIONAL BANK OF DETROIT, a National Banking Corporation,

Defendants

MEMORANDUM OPINION AND ORDER

The trial of the instant cause was held from May 26 to May 28, 1987. Pursuant to Fed. R. Civ. P. 52, the Court now enumerates its "Findings of Fact" and

"Conclusions of Law." The Court has jurisdiction under 28 U.S.C. § 1332.[1]

FINDINGS OF FACT

The Plaintiff, Reverend Vasil Kendysh,[2] is the Secretary of the Consistory of the of the Byelorussian Autocephalic Orthodox Church (BAOC). The BAOC was founded in Germany in 1948, adheres to the tenets, canons, doctrine and tradition of the Holy Ecumenical Apostolic Church, and maintains parishes in the United States, Europe, Canada, and Australia. The Consistory is an intermediate administrative ecclesiastical judicatory of the denomination with duties that include a general responsibility for church property.

The Defendant, Holy Spirit Byelorussian Autocephalous Orthodox Church (Holy Spirit Church), is an ecclesiastical corporation which was organized under the laws of the

State of Michigan on May 10, 1971, with its principal office at 14861 Collison, East Detroit, Michigan. The Defendant, Bazyli Pleskacz, is the Secretary of the Holy Spirit Church. The Defendant, Manufacturer's National Bank of Detroit (MNB), is a national banking corporation which conducts its business in the State of Michigan.

At the trial, Archbishop Mikalay,[3] whom the Holy Spirit Church recognizes as its spiritual leader, and Joseph Sazyck, the current President of the Holy Spirit Church Council, testified that the Holy Spirit Church began in 1967 as a fellowship of likeminded people in the Detroit area who conducted religious services in their own private homes. In 1971, the group purchased a church building for $25,000,[4] which was derived from contributions from persons who became "founders" of the Holy

Spirit Church. Subsequently, the Holy Spirit Church acquired another parcel of realty,[5] which was adjacent to the first parcel and served as a Rectory.[6]

In May 1971, the fellowship became incorporated under the title of the Holy Spirit Byelorussian Autocephalic Orthodox Church.[7] Pleskacz, Sazyck, and Walter Bakunovich signed the Articles of Association on behalf of the Holy Spirit Church. Paragraph Fourth of the Articles of Association reads:

> The members of said church or society shall worship and labor together according to the discipline, rules and usage of the Holy Apostolic Oecumenical Orthodox Church in the United States of America (or other jurisdiction as the case may be), as from time to time authorized and declared by the NONE
>
> (Here Insert the name of the higher ecclesiastical body or bodies, if any, authorized to determine such question).

(Lines in original). The Defendants assert that this provision demonstrates their

independence from the BAOC. The Holy Spirit Church adopted a set of By Laws, many of which reflect a strong affiliation to the BAOC. However, those provisions which relate to property (to wit, paragraphs 18 and 20), indicate that a retention of interest by the local parish was intended.[8]

On May 28, 1972, the BAOC convened a convention for the purpose of (1) formalizing the relationship between the BAOC and its various parishes throughout the world, and (2) selecting a primate of the Church.[9] Notice of the convention was sent to each of the parishes one or two months in advance.

There was much dispute between the parties as to whether John Brucky and Bakunovich were convention delegates of the Holy Spirit Church or were merely interested individuals who had attended the sessions

without official credentials. Bakunovich, claiming to have paid his own expenses, asserts that he was not a representative of the Holy Spirit Church at the convention. However, Brucky noted that he and Bakunovich had exercised their voting privileges as convention delegates of the Holy Spirit Church. Although Brucky claims that his right to appear at the convention as a delegate was verified by a convention committee, he was unable to produce the letter which was ostensibly used by him to establish his credentials. Mikalay, who also attended the convention, testified that Kendysh had made Brucky and Bakunovich the Detroit representatives.

The Court finds Bakunovich's assertions on this point to be highly questionable. Although he and Brucky may not have been formally elected by the Holy Spirit Church

to serve as delegates to the convention, it is clearly evident that they did act in such capacities. Certainly, there is nothing to indicate that Bakunovich objected to such a designation at the convention. This was a convention, which was convened to create, inter alia, a Constitution for the BAOC. It is not plausible to think that non-representatives or unofficial individuals would be allowed to participate in such a historic event.

Indeed, the minutes of the convention demonstrate that Brucky and Bakunovich were significant participants.[10] For instance, page 4 of the minutes, which identifies all of the convention delegates, lists Brucky and Bakunovich from the "parish in Detroit." On page 1, the minutes indicate that Bakunovich was elected to the important

role of Secretary at the convention. However, it should be noted that he did not recall such an election when queried during the trial. This Court finds his response to be devoid of credibility in view of the significance of the election and his obvious desire to minimize his role at the convention. Bakunovich and Brucky were also selected to serve on the BAOC Council at the convention. In addition, Brucky, as a lay delegate, was also unanimously elected to the presidium of the convention. The record certainly indicated that each of these men acted as if they had the authority to represent the Holy Spirit Church despite Bakunovich's disclaimer. Accordingly, this Court determines that Brucky and Bakunovich served as delegates to the convention as representatives of the Holy Spirit Church.

The minutes detail the deliberations by the convention delegates about the formation of a Constitution for the BAOC. On May 28, 1972, the convention adopted the following proposal:

> That the convention accept the constitution of the BAOC in principle and delegate to the constitutional commission the task of formulating its contents, form and language in conformance to the spirit of the convention and with consultation of the delegates to today's convention and through a referendum.

All of the witnesses during the trial agreed that a Constitution[11] was only adopted in principle at the convention. A referendum was to follow after acceptable language had been agreed upon. Page 3 of the minutes also indicates that "Archbishop Andrew was elected as primate of the BAOC, hereinafter known as Metropolitan Andrew."

Work on the precise language of the Constitution continued over the next several years. On August 20, 1975, Andrew appointed Reverend Makeim Taupieka to serve as the priest for the Holy Spirit Church. Although it appears that Mikalay played an instrumental role in the appointment of Taupieka, the Holy Spirit Church accepted Andrew's ultimate authority to designate a priest. Indeed, Paragraph 5 of the Holy Spirit Church By Laws indicate that the authority rested only with Andrew.[12] The Defendants' apparent assertion (to wit, that the Holy Spirit Church actually had the essential authority over the appointment of the priest) is belied by the statements of Plezkacz who repeatedly said that he lacked any authority to oust Taupieka. He opined that only Andrew had such power.

The Statute was ultimately promulgated with a January 1, 1976 effective date.[13]

The Statute was signed by Andrew, Kendysh, and Vasil Rusak, as the Secretary of the BAOC convention. The Defendants assert that the Statute was improperly promulgated because it was never sent to the delegates for a referendum as required by the convention. Kendysh essentially admits this point, arguing only that the Holy Spirit Church and the other parishes, in failing to express any objections, acquiesced in the adoption of the Statute. This Court agrees with the Defendants and finds the evidence to be conclusive that no referendum was ever held on the Statute.[14]

According to the Statute, all local statutes of the parishes and dioceses were immediately cancelled and lost their effectiveness on January 1, 1976. Under Paragraph 29 of the Statute, control of local property was handled by the trustees:

> The purchase of disposition of church real estate/property, land and buildings are to be carried out by trustees.

> (At least three persons) when property of the Consistory is involved, the latter appoints the trustees. In the Diocese, trustees are elected by the Diocesan Convention, in the Parish, by a meeting of the parishioners.... Trustees carry out transactions of purchase or sale in the name of the BAOC, as stated in paragraph 107 of these statutes...

The property under control by the parishes become the property of the BAOC, as set forth in Paragraph 98 of the Statute:

> All real estate, land, church buildings, chapels, other buildings, cemetaries, as well as all movable property and inventory - purchased or donated - funds in bank accounts or cash in current use under the authority and management of the Consistory, Dioceses, Parishes, Missions, and Monasteries which belong to BAOC jurisdiction is incontestably the property of the Byelorussian Autocephalic Orthodox Church.

Under the provisions of Paragraph 54 of the Statute, the Consistory became the Church body with supervisory authority over church assets:

> The duties of the Consistory include: (a) Execution of decisions passed by the BAOC General Convention, Council of Bishops and BAOC Council; (b) Close contact with Dioceses and Parishes;

(c) Fund raising and preparation of an annual budget proposal for the BAOC; (d) Maintenance of strict accounting for the real estate and property of the BAOC; (e) Keeping a roster of BAOC clergy; (f) Actual conduct of negotiations and other formalities connected with the purchase or sale of real estate and land, following the decision of the BAOC Council in the matter; (g) Intercession for and defense of BAOC interests whenever needed.

In certain circumstances, the Consistory acquired the authority to take direct control of all parish assets, as evidenced by Paragraph 110 of the Statute which reads:

> Liquidation of a Mission, Monastery or Parish can occur only with the consent and order of the Consistory. When the necessity arises to liquidate or to transfer them to a jurisdiction other than that of the BAOC, all real estate property, land, church edifices, and other buildings with furniture and all movable inventory as well as books, documents and archives, bank accounts, and cash money, any and all property that has been under the authority of said institutions, the Mission, Monastery, or Parish, automatically comes under the direct authority of the Consistory as property of the BAOC.

Paragraph 111 of the Statute states:

> At the time when a resolution is passed at the General Meeting to liquidate, or to transfer to other than the BAOC jurisdiction, a Mission, Monastery, or Parish, no person or institution within the affected unit has the right to prepare or sign deeds or other documents of purchase or sale of land, church building or other buildings, or any other Church property, nor otherwise can anyone sell or take anything of Church property to his home or anyone else's home, or to give it away to anyone else, nor can anyone in the name of the liquidated unit enter into agreements with other organizations, associations, corporations, or institutions. Anyone breaking this rule is accountable before a court of law.

Within the BAOC structure, as portrayed in the Statute, the primate is the spiritual leader and chief ecclesiastical officer who presides over the dioceses. In 1978, the BAOC split into an American and Canadian Diocese. The American Diocese has jurisdiction over the local churches in the United States. The Canadian Diocese has jurisdiction over parishes in Canada and

Europe. Each diocese is presided over by a governing bishop who has the ecclesiastical and administrative authority over the parishes within his diocese. When created, Andrew headed the American Diocese and Mikalay headed the Canadian diocese. Each parish in the diocese has a pastor, who is appointed by the governing bishop, and a parish council which has the custodial supervision over parish property. Within the diocesan structure, the parishioners and their parish council are ostensibly fully subordinate to the authority of their governing bishop. The chief ecclesiastical judicatory is the Council of Bishops which is chaired by the primate.

The trial record demonstrated a repeated recognition of the power of the Statute by the Holy Spirit Church. For example, the Plaintiff's Exhibit 5 is a letter, dated February 12, 1976, from the

Chairman of the Holy Spirit Church Parish Council to the BAOC Consistory in which he reports the results of the then-most recent BAOC parish election. The Holy Spirit Church also forwarded parishioner lists to the Consistory. The evidence in the record also indicates that no non-member parishes of the BAOC took any similar action or showed any such devotion.

The Plaintiff's Exhibit 19 is a July 14, 1977 letter from Mikalay who advised Brucky to comply with the Statute. During the trial, Mikalay also acknowledged in the letter that he was not the Diocese head of the Holy Spirit Church, contrary to the views of the Holy Spirit parishioners. However, Mikalay, who claims to be the spiritual leader of the Holy Spirit Church, now contends that the Statute is invalid. Mikalay bases his changed position with regard to the authority of

the BAOC and his position within the Holy Spirit Church on a recent discovery that no post-convention referendum was ever conducted. This "discovery" is somewhat troubling in view of the level of his involvement with the BAOC and the Holy Spirit Church, and his chairmanship of the Constitutional Committee. Despite this apparent awareness, Mikalay did not demonstrate any concern about the absence of a referendum for several years until the commencement of this lawsuit. Indeed, Mikalay acted as if he was bound by the Statute. Despite his contention, this Court believes that it was the schism between the parties to the instant lawsuit -not his recent discovery- which caused him to change his position regarding the Statute.

The Plaintiff's Exhibit 7 reflects the minutes of the BAOC Council which was held on May 22, 1977. Brucky attended the meeting on behalf of the Holy Spirit Church. No non-member parishes were present. The Plaintiff's Exhibit 9 records the assessments that were paid by the Holy Spirit Church to the Treasurer of the BAOC. This Court does not believe, as the defendants contend, that these payments by the Holy Spirit Church were simply voluntary contributions to the BAOC. Indeed, the Plaintiff's Exhibit 15 provides a listing of dues paid by the various parishes, including the Holy Spirit Church, in 1978 and 1979. Although these payments were not large, this suggests that the Holy Spirit Church considered itself to be bound to the hierarchy at that time. In the Plaintiff's Exhibit 13, the notes from a BAOC Council meeting on May 20, 1979

indicate that there were fifteen active parishes, including Holy Spirit Church, in the United States at the time of trial.

The record at trial demonstrates a general obedience by the Holy Spirit Church to the BAOC from its inception until October 12, 1980 when the holy Spirit Church requested Mikalay to take the parish under his control. However, Andrew rejected this action by the Holy Spirit Church sometime thereafter. In the September 1981 "Declaration," the members of the Holy Spirit Church Parish Council requested Andrew not to recognize Brucky as a BAOC bishop.[15] This document makes clear that the Holy Spirit Church, while demonstrating a strong allegiance to the BAOC, no longer recognized Andrew as its spiritual and administrative leader.

Kendysh produced several documents which indicate that the Holy Spirit Church saw itself as a full member of the BAOC.

For example, Exhibit 17 is an affidavit of Bakunovich which was executed on May 10, 1982 wherein he avers "I am a duly elected trustee of the Byelorussian Autocephalic Orthodox Church... I have not resigned nor have been dismissed from that position and that I continue to serve in my capacity as a trustee." Several months later (November 15, 1982) and even after the schism, Bakunovich still sought to participate in the BAOC Council.[16]

According to Pleskacz, the first problem occurred when Taupieka refused to perform a liturgy with Mikalay. At a later time (February 1983), he refused to go to a conference in Cleveland, Ohio which involved dissident parishes. Taupieka subsequently left the Holy Spirit Church in April 1983.

Although Taupieka does not deny these contentions, he claims to have been forced out of his office (e.g., threatened with immigration problems, told that his services would not be needed, and advised that he would not be paid). Pleskacz has denied all of these allegations. Taupieka essentially admitted during the trial that he had no immigration difficulties. Moreover, Pleskacz and others testified that only Andrew could terminate a priest. Thus, it is highly unlikely he was told by Pleskacz that he would be terminated.

Finally, the record also appears to indicate that the Holy Spirit Church did not pay for his services after 1975, although this issue was left somewhat confused. Under these circumstances, it does not seem likely that the Holy Spirit Church could threaten to cut his expenses.

However, it is crystal clear that Taupieka found the working environment at the Holy Spirit Church to be extremely difficult since he supported Andrew and the parishioners supported Mikalay.

Regarding the property sought by Kendysh, the evidence shows that the Holy Spirit Church had less than $40,000 deposited with MNB. Kendysh seeks these funds in addition to the two parcels of land to which reference has been made earlier. The Defendants do not deny that Pleskacz voted along with the rest of the Holy Spirit Church membership to appropriate (a) $10,100 for the purchase of a car for Mikalay between October 1980 and December of 1983, (b) $3,000 for his legal defense, and (c) $5,000 to two other parishes.

CONCLUSIONS OF LAW

The first Supreme Court case to clarify the role that the courts should play in resolving church property disputes was Watson v. Jones, 80 U.S. 679 (1872). In Watson, the Court noted that there were essentially three kinds of church property disputes; namely, those (1) where the deed expressly gives the property to some form of religious doctrine, (2) in which the property is given to an independent congregation, and (3) wherein the property involved a hierarchical church polity. Watson defined this third example as encompassing the situation:

> where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of the general organization.

Id. at 722, 723.

Watson then adopted the "strict deference" approach in the hierarchial church cases, which directs the courts to defer to the decision of the highest church judicatory to which the matter has been carried. Id. at 727. The Court stated this was the only method that could result in a sound view of church-state relations and prevent state interference in church affairs. Id. For years, no other approaches were common.

However, in recent years, the Supreme Court has also endorsed the "neutral principles of law" approach to church property disputes. In Presbyterian Church v. Hall Church, 393 U.S. 440 (1969), the Supreme Court rejected a state court approach that had inquired into church doctrine as a means of deciding which faction should be awarded the property in dispute. The Supreme Court concluded that such an approach would violate the First

Amendment Clause which bars the "establishment" of religion. However, the Court stated that "neutral principles of law" could be used for deciding which faction had the property right.

This approach was further endorsed in Jones v. Wolf, 443 U.S. 595 (1979), when the Court stated that it was acceptable to decide the dispute:

> on the basis of the language of the deed, the terms of the local church charters, the state statutes governing the holding of church property and the provisions in the constitution of the general church concerning the ownership and control of church property.

Id. at 603. The Court noted that such an approach would (1) leave it unentangled in questions of religious doctrine and (2) allow private parties to structure their relationships with "appropriate reversionary clauses and trust provisions." Id.

All parties to the instant controversy agree that Michigan law is controlling in this diversity action case. Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938). Therefore, the first questions to be addressed is what kind of relationship did the Holy Spirit Church have with the BAOC. The Holy Spirit Church contends that it is independent of the BAOC and, thus, Kendysh is not entitled to either of the properties. On the other hand, Kendysh disagrees, claiming that the Holy Spirit Church is a part of its hierarchy.

It is quite clear that the BAOC intended to have a hierarchial relationship with its parishes regarding all matters including property. As "hierarchial" was defined in Watson v. Jones, supra, the key inquiry is whether the congregation which holds the property is subordinate to

"superior ecclesiastical tribunals with a general and ultimate power of control." Michigan law is in accord with this general definition of a hierarchial policy. See e.g. Bennison v. Sharp, 121 Mich. App. 705, 718.

The structure of the Church as set out in the Statute, and discussed in the findings of fact, makes clear that the BAOC intended to control its parishes in almost every area, including priest appointments, doctrinal disputes, and property. A set of judicatries also exists going up to the Council of Bishops. Paragraph 98 of the Statute indicates that all of the property of the parishes, etc. belong to the entire church.[17] Although the parish had much day to day control, the ultimate control was with the hierarchy. Almost all courts agree that the Eastern Orthodox churches are hierarchially

organized "with respect to spiritual or ecclesiastical authority..." See e.g. Annotation, Determination of Property Rights Between Local Church and Parent Church Body: Modern View, 52 A.L.R.3d 324, 399 (1973).

Defendants disagree, asserting that the Statute is invalid. They argue that the 1972 convention, without any definitive language before it, decided to conduct a referendum after the appropriate language had been drafted. Thus, the Defendants submit that the absence of the requisite referendum invalidates the Statute.

The early Supreme Court decisions allowed an attack on the arbitrariness of the procedures that are employed by the hierarchical polity in making decisions with an impact on property rights. In Gonzales v. Roman Catholic Archbishop of Manilla, 280 U.S. 1, 16 (1929),

Justice Brandeis said, in dicta, that the decisions of the ecclesiastical authorities should be upheld unless they are the product of fraud, collusion, or arbitrariness. This would seem to provide a legal basis for the Defendants' attack on the Statute.

However, in Serbian Eastern Orthodox Diocese for the United States of America and Canada, et al v. Milivojevich, 426 U.S. 696, 713, the Court rejected the Brandeis dicta. In Serbian, the Supreme Court held that an inquiry by the courts into the propriety or arbitrariness of ecclesiastical procedures is a prohibited judicial intrusion into the internal affairs of the church. Id. at 713-14. Serbian, in addressing the precise issue of when a church violates its own procedures, stated that it is not the role of the court to invalidate governing body decisions of the church. The case, which is currently before this Court,

provides a classic example for the prohibitions of Serbian. If this Court declared the Statute to be invalid, it would destroy the centerpiece of the BAOC. In the absence of fraud, collusion, or lack of jurisdiction, the Court must defer to the hierarchy.

As Serbian points out, it is the nature of the hierarchical policy where pronouncements are undemocratically made that members of the church accept the pronouncements:

> as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of "fundamental fairness" or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.

Id. at 714-15. Thus, the Statute is presumptively valid.

Even though the Statute establishes a hierarchical polity, it does not determine whether the Holy Spirit Church was a part

of that polity. This Court believes that the so-called "living relationship test" is the best way to make such a determination without intruding into the realm of ecclesiastical decisions. This test was excellently summarized by one commentator who was supportive of its use:

> It seems far preferable to look to the lines of church authority as they existed just before the dispute impaired them. Courts using this approach have emphasized such factors as whether the local organization accepted ministers appointed by diocesan executives, regularly sent delegations to denominational convocations, received financial assistance from the general church, or made payments to the funds of the general church. This inquiry has the advantage of directing the courts' attention to the prevailing understanding within the church and of eliciting difficult questions of the construction of ecclesiastical documents. Long-continued renunciation of hierarchical control should be conclusive of autonomy; conversely, acquiescence by the local congregation in the exercise of discipline and the management of its internal affairs by the hierarchy should preclude an assertion of autonomy.

Note, "Judicial Intervention in Disputes Over the Use of Church Property," 75 Harv. L. Rev.

1142, 1162 (1962). Michigan case law has impliedly adopted this approach as have the Ohio and Pennsylvania Supreme Courts. The crucial time of inquiry is the period "just before the dispute" arose.

In United Armenian Church v. Kazanjian, 322 Mich. 651, 658 (1948), the Michigan Supreme Court looked at factors such as whether the defendant attended church conventions, acted as a delegate, had expenses paid, etc., in determining whether she was affiliated with a particular hierarchy of the United Armenian Brethren Church. The court, in effect, looked at the living relationship of the parties. Thus, Michigan law is supportive of this approach.

In State ex rel. Morrow v. Hill, 364 N.E.2d 1156, 1158 (Ohio 1977), the Supreme Court of Ohio explicitly adopted the "living relationship test" in affirming

the analysis by the lower court:

> In particular, the (trial) court considered that each member of the congregation took a vow to adhere to the national discipline; that the local church participated in national conferences by sending delegates; and that it provided officers in the national organization's government and generally followed prescribed national procedures in its day-to-day operations.

The Ohio Supreme Court cited John Chryostrom Greek Catholic Church of Pittsburgh v. Elko, 259 A.2d 419 (Pa.), cert. denied, 399 U.S. 920 (1969), wherein the Pennsylvania Supreme Court relied upon the "continuous and active participation (of the local church) in the affairs of the national body until the dispute arose" to show the affiliation. Id. at 1159.

Based on these factors, this Court believes that the preponderance of the evidence clearly shows the Holy Spirit Church to have been a part of the BAOC hierarchy prior to the schism in October

of 1980. As the findings of fact demonstrate, the Holy Spirit Church (1) accepted the primate's appointments of priests, (2) paid its dues, (3) kept the Consistory informed of parish elections, (4) transmitted lists of its parishioners, (5) had members who actively participated actively in BAOC affairs as officers, and (6) repeatedly invoked the BAOC Statute as the authority for its actions.

The Defendants argue that their autonomy is apparent because they consistently obeyed Mikalay whom they contend was truly responsible - not the BAOC - for getting Taupieka as a priest. This argument must be rejected because Kendysh introduced a substantial amount of evidence which demonstrated that Mikalay was emotionally devoted to the BAOC until the schism between the parties in 1980. As an example, in Plaintiff's Exhibit 19, Mikalay wrote

to Brucky, urging him to comply with the BAOC rules:

> It is necessary to keep in mind that the head (head of parish) of the Holy Spirit Parish in Detroit is Rev. Maksim Taupieka, and that the governing bishop is Metropolitan Andrew. I am only for Canada.

This Court does not accept the Defendants' assertions that their payments to the BAOC were only gifts - not dues or assessments. The facts indicate that, like all the parishes, the Holy Spirit Church saw itself as being obliged to help fund the BAOC hierarchy. Clearly, the Holy Spirit Church was a part of that hierarchy. Although the Articles of Association indicate that the Holy Spirit Church is not governed by a higher ecclesiastical authority, this evidence is offset by (1) Paragraph Fourth which reads, in part, that "(t)he members of said church or society shall worship and labor together according to the

discipline, rules and usage of the Holy Apostolic Oecumenical Orthodox Church in the United States of America, and (2) its By Laws which clearly indicate an obedience to the BAOC. Moreover, the Michigan Supreme Court has determined that where a local parish s articles of association are in conflict with a controlling church order, the articles are void on that point. See e.g. Second Protestant Reformed Church v. Blankespoor, 350 Mich. 347, 352 (1957). See generally, 52 A.L.R.3d at 354 (and cases cited herein). Above all, the "living relationship" shows the hierarchical relationship.

Inasmuch as it has now been determined that the Holy Spirit Church is a part of the BAOC hierarchy, the next question is whether their relationship contemplated the release of title, interest in, and

possession of, the properties to the BAOC in case of a schism. In Bennison v. Sharp, 121 Mich. App. 705, 718 (1982), it was determined that Michigan courts have the authority to employ either the "neutral principles" or the "strict deference" approaches to resolving hier-archical property disputes. Under the "strict deference" approach, Kendysh is entitled to all of the property that is currently in the possession of the Holy Spirit Church because the Consistory has asserted its authority as a judicatory of the Church.

Under the "neutral principles" approach, the Court must make a secular analysis of all relevant documents such as national church charters, local by laws or articles, relevant deeds, significant state statutes, etc. According to the Statute, Paragraph 98 makes clear that all property belonging to the parishes "is

incontestably the property of the Byelorussian Autocephalic Orthodox Church."

As noted earlier, Paragraph 113 cancelled the local statutes of the parishes and dioceses. Having already determined that it cannot evaluate the validity of the Statute, this Court concludes that it must defer to the hierarchy on this point. Therefore, any provisions within the Articles of Association and/or the By Laws of the Holy Spirit Church which state that property can be disposed by the parishioners are nullified by this superior authority.[18]

Indeed, there is a strong presumption that where there is a hierarchical polity and the governing constitution provides that all property ultimately resides with the national church, a "neutral principles" analysis will result in the property being

held in trust by the local for the national church. One commentator has written:

> The fact that the local church's charter or other documents contained provisions inconsistent with hierarchical control of local property or was amended to have this significance, and the fact that the church property in question was paid for entirely out of funds raised by the local congregation, and not with any financial help from the denomination, have been held to have no effect on the rule that the parent body of a hierarchical church has the right to control local church property.

52 A.L.R.3d at 335. See also Second Protestant Reformed Church, 350 Mich. 347 (inconsistent provisions regarding property); Note, 75 Harv. L. Rev. at 1163-64 (the fact that local funds built church property is ordinarily a "neutral factor" regarding autonomy).

It is true that the deeds identify the Holy Spirit Church as the owners of the properties. However, such an identification is not inconsistent with Kendysh's position

that the Holy Spirit Church holds the property in an implied trust for the BAOC. In Fuchs v. Meisel, 102 Mich. 357, 371, the Supreme Court of Michigan stated that "it is immaterial in whom the legal title stands. One party may hold the title, and another be entitled to the use and possession of the property." Here, the documents and relationship show that the properties were held in trust for the national church even though they were initially bought by local parishioners.

The documents and the nature of the relationship of the parties fail to produce any evidence that the Holy Spirit Church was completely independent of the BAOC regarding its temporal matters prior to the schism. See e.g. Colin v. Iancu, 82 Mich. App. 521, 528 (review of the constitution determins to whom property is awarded in the event of a schism);

52 A.L.R.3d at 370 (acquiescence in the constitution by local church is enough to make it binding though never formally adopted). Also see United Methodist Church v. St. Louis Crossing Independent Methodist Church, 276 N.E.2nd 916, 925 (Ind. App. 1971) which determined:

> A local church, if it desires to remain independent of the influence of a parent church body, must maintain this independence in the important aspects of its operation - e.g., polity, name, finances. It cannot, as here, enter a binding relationship with a parent church which has provisions of implied trust in its constitution, by-laws, rules, and other documents pertaining to the control of property, yet deny the existence of such relationship. It does not matter whether such agreement to be bound is memorialized. A local church cannot prosper by the benefits afforded by the parent, participate in the functioning of that body, yet successfully disclaim affiliation when the parent acts to the apparent disadvantage of the local, so as to shield from equitable or contractual obligation the valuable property acquired by the local church either before or during such affiliation.

Those cases, in which the courts have found parishes entitled to retain the church property, are easily distinguishable. For Example, in Russian Orthodox All Saints Church v. Darin, 222 Mich. 35 (1923), the governing constitution of the national church recognized the independence of the parishes on property matters. Nothing could be less true of the Statute here. Moreover, the parishes in Darin had the authority to select priests - unlike the factual situation here.

One of the strongest cases that the Defendants could have relied upon is St. John's Greek Catholic H.R.O. Church v. Fedak, 233 A.2d 663 (N.J. Super. 1967). In that case, it was not clear with what national organization the parish was affiliated. Moreover, the priests served at the pleasure of the parish, and there was evidence of the parish's insistence on

independence over a period of years. Here, there is no evidence of anything but obedience prior to the schism. The priests were appointed by the Metropolitan, and the parish by laws reflect an affiliation with the BAOC. Therefore, under the neutral principles analysis, this Court concludes that the Holy Spirit Church holds its properties in trust for the BAOC.

The Defendants raise two additional arguments which merit discussion. First, they rely upon Paragraph 70 of the Statute which requires new parishes to apply to the BAOC in order to become members of the hierarchy. However, since the Holy Spirit Church was an original participant in forming the BAOC, it cannot be described as a new parish. Hence, Paragraph 70 is not applicable to this controversy.

The Defendants' more substantive objection is that the Michigan Statute of

Frauds, M.C.L.A. §§ 566.106, bars any obligation on their part to transfer the title to the BAOC. The Michigan Supreme Court has rejected the applicability of the Statute of Frauds to resulting (implied) trusts or constructive trusts over property. See e.g. Thurn v. McAra, 374 Mich. 22, 24-25 (1964); Kent v. Klein, 352 Mich. 652, 656 (1958). These cases also indicate that constructive trusts, in Michigan, arise not only when there is fraud in acquiring property interests but also "where property is unconscionably withheld." Thurn v. McAra, 374 Mich. at 26-27. The Statute of Frauds is clearly inapposite to this case. In finding an implied trust or a constructive trust, this Court is acting through its equitable powers by creating a remedy where none would otherwise exist. Under the circumstances of this case, the failure of the Defendants to promise in writing to

hold the properties in trust as the Statute of Frauds would require is not relevant. Kent v. Klein, 352 Mich. at 656. Here, it is clear from the prior discussion that the Holy Spirit Church held the properties in trust for the BAOC.

Kendysh claims that Pleskacz breached his fiduciary duty to the BAOC by approving the expenditures of funds in the amount of $18,100 ($10,100 for an automobile, $3,000 for his legal defense, and $5,000 to two other dissident churches) to Mikalay without authority between October 12, 1980 and December 1983. Pleskacz does not deny having approved the payments, but contends that he (1) acted in the interest of the parish, and (2) was only one person among a unanimous parish who voted to make the payments.

This latter argument is unpersuasive. In Pappas v. Moss, 303 D. Supp. 1257; 1280 D. N.J. (1969), the Court stated:

> A liability to make good on less resulting from a breach of trust participated in by more than one trustee is both joint and several so that each defendant is liable for the whole loss.

Cf. In re Tolfree Estate, 347 Mich. 272 (1956) (co-trustee could not escape from liability on the ground that he left it to the co-trustee to take action).

The first question which must be resolved is whether Pleskacz was acting as a fiduciary of BAOC. A fiduciary relationship exists where "there is special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to interests of one reposing the confidence." Neagle v. McMullen, 334 Ill. 168 (1929).

There is no doubt that the Holy Spirit Church held the church properties in trust for the BAOC. Thus, as an officer of the Holy Spirit Church, Pleskacz was an implied fiduciary for BAOC.

However, the more important question is whether Pleskacz breached any fiduciary duty. The general rule regarding a trustee who is expected to care for property is stated in M.C.L.A. s^{s} 700.813 which specifies that:

> the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

M.C.L.A. s^{s} 700.813. The underlying presumption is an awareness by the trustee that he possesses the property of "another" and, thus, is expected to act accordingly.

See Henderson v. Sherman, 47 Mich. 267 (1982) where the Court stated:

> Mr. Sherman fully accepted the office and he thereby made it his legal duty to exercise reasonable skill and diligence in the execution of the respective trusts specified in the deed. This was not done.

Id. at 275 (emphasis added). The instant case is distinguishable because Pleskacz never explicitly "accepted" any trust duty. As a matter of law, this Court implied a trust relationship between Pleskacz with the BAOC. However, an examination of the entire record suggests that he genuinely believed (1) the property to have been exclusively held for the parish and (2) his actions with regard to the expenditure of money were done as an officer for the benefit of the Holy Spirit Church.

An analogy to the area of bailment law will show why this result is necessary:

> An involuntary bailee, as long as his lack of volition continues, is not under the slightest duty to care for the subject of the bailment, and cannot be held, in respect of custody, even for what would be the grossest negligence in the case of a voluntary bailment.

4 Michigan Law and Practice, "Bailment," Sec. 6 at 45.

In the absence of any evidence that Pleskacz did not act in good faith with regard to the contested property interests, and inasmuch as his belief that the Holy Spirit Church alone controlled the dissemination of monies was reasonable under the circumstances, this Court concludes that Kendysh has failed to establish his burden of proof with regard to the breach of fiduciary duty claim. Moreover, it would be totally unfair for this Court to find Pleskacz violated a duty about whose existence he reasonable was unaware.

Finally, Kendysh claims that Pleskacz "evicted" Taupieka from the Holy Spirit Church. By analogy, this Court will rely upon the general legal standards, which govern evictions by landlords of tenants, to assist in the legal reasoning. M.C.L.A. §§ 600.2918 governs these kinds of evictions in Michigan. An action for eviction generally requires proof of an intent to evict. Thompson on Real Property, § 1132 at 493. All of the evidence indicates just the opposite. Pleskacz testified that he only wanted Taupieka to do the liturgy with Mikalay. Contrary to Kendysh's contention, the testimony reflects a desire by Pleskacz to work with Taupieka - not to evict him. There is also no persuasive evidence of any malicious intent by Pleskacz to retaliate against Taupieka because of his support of Andrew in the church dispute.

In general, this Court finds Pleskacz testimony (to wit, that he never threatened Taupieka) as being more credible than the opposition evidence.

Finally, Taupieka's allegations (to wit, he might lose his salary) were vague and unsubstantiated by any evidence. The evidence makes it appear that Taupieka left the Holy Spirit Church because of his disagreements over spiritual matters, and not because of the actions of Pleskacz. As a result, this Court concludes that Kendysh has not proven his eviction claim by a preponderance of the evidence.

Kendysh also seeks an accounting from the Defendants on the basis of the fiduciary relationship between the BAOC and the Holy Spirit Church. However, Kendysh has failed to assert that he ever requested an accounting from the Holy Spirit Church which was refused. Such allegations are usually

required in the Complaint before a court will grant a claim for an accounting. See generally Accounts and Accounting, 1 Am. Jur2d ss 46 at 420 and 430. In addition, Kendysh made only the vaguest assertions at trial that there may be other property in the Defendants' hands about which he was not aware. Such assertions are inadequate. As a consequence, this Court will deny Kindysh's request for an accounting.

On the basis of the preceding analysis, this Court issues the following final order:

1. All causes of action against Pleskacz are hereby dismissed, with prejudice.

2. The Holy Spirit Church, its officers, employees, representatives, agents, and any other persons who are associated with the Holy Spirit Church, are enjoined and restrained from (a)

diverting, assigning, releasing, appropriating, and/or transferring any funds, income, property, or revenues to any person or entity and/or for any use which has not been sanctioned by Kendysh, and (b) excluding, or attempting to exclude, any duly appointed pastors and deacons who have been selected by the BAOC through the governing Bishop of the American Diocese to serve the Holy Spirit Church.

3. The Holy Spirit Church shall convey all right, title and interest in and to the parcels of realty which have been more fully described in this Order,[19] and as specified in the Defendants' Exhibit C and D, to Kendysh, in his official capacity as an officer of the BAOC, within thirty (30) days of this Order.

4. MNB shall turn over, release and surrender to Kendysh, in his official capacity as an officer of the BAOC, all

funds on account and assets of the Holy Spirit Church in its possession within thirty (30) days of this Order.

5. Kendysh's request for an accounting shall be denied without prejudice.

6. This represents a final Order of this Court.

IT IS SO ORDERED.

(signature of Judge Cook)
JULIAN ABELE COOK, JR.
United States District Judge

Dated: June 18, 1987
Detroit, Michigan

(Illegible stamp)

FOOTNOTES

1) The Plaintiff is a citizen of Massachussets. The Defendants are citizens of Michigan. The amount in controversy exceeds $10,000. By stiputation, the Defendant, Manufacturers National Bank, did not appear at trial and agreed to remit the funds in controversy to whomever the Court directs.

2) Kendysh appears in his individual and representative capacities.

3) The BAOC disputes Mikalay's authority to use the Archbishop title. This Court does not make any judgment, expressed or implied, regarding the merit of the BAOC's contention. This is clearly a church matter. The Court has utilized the name by which he was identified during trial.

4) According to the warranty deed, the property is described as follows:

Lot 51 of Eastwood Manor, a subdivision of a part of the Southwest 1/4 of Section 31, Town 1 North, Range 13 East, Erin Township, and a part of the Southeast 1/4 of Section 36. Town 1 North, Range 12 East, Warren Township, Macomb County, Michigan, according to the Plat thereof as recorded in Liber 6 of Plats, Page 38, Macomb County Records.

5) The Quit Claim Deed describes the property as "Lot 52, of Eastwood Manor Subdivision as recorded in Liber 6, Page 38 of Plats, Macomb County Records."

6) Both deeds place the title to the respective properties in the Holy Spirit Church. Neither instruments make any reference to the BAOC.

7) The Articles of Association were filed with the Michigan Department of State on May 10, 1971. Pleskacz, Sazyck, and Walter Bakunovich signed the Articles of Association on behalf of Holy Spirit Church.

8) These paragraphs read as follows:

18. The parish property shall consist of:

a) Parish buildings with all accessories and religious articles for ecclesiastical use.

b) personal and real estate bought or donated to the church

20. Only the Hierarchy of the B.A.O.C. shall have the power to resolve and terminate the existence of the parish.

Liquidation of all real and personal property shall take place only at the request of two-thirds majority of the founders or their descendents.

Distribution of the property of the parish or the proceeds from their sale shall be subject to the decision of the founders at the time of liquidation.

A founder is defined as the original contributor of $1,000 for the church building fund and holder of a special certificate issued by the Parish Council before April 29, 1971 signed by the President, Secretary and Treasurer of the Parish Council.

Religious articles, books and archives shall be turned over to the Ruling Bishop of the parish of the B.A.O.C.

9) Two members of the Holy Spirit Church (Bakunovich and John Brucky, now Metropolitan Isiaslau) attended the convention.

10) Minutes of the Second General Convention of the Byelorussian Autocephalic Orthodox Church held on May 27, 28 and 29, 1972

in the church of St. Mary of Zyrovicy, Highland Park, New Jersey, U.S.A.

11) The Constitution was entitled "Statute of the Byelorussian Autocephalous Orthodox Church."

12) Paragraph 5 of the By Laws reads:

> 5. Beside the parish priest, depending on the needs and financial resources of the parish, there can be more priests, deacons and psalmists. All priests are appointed by the Ruling Bishop of B.A.O.C.who has jurisdiction over the parish. The clergy and other personnel or the parish help organize and conduct the Parish acrivities under the supervision of the parish priest.

13) Paragraph 113 of the Statute reads:

The principles of these Statutes were accepted by a decision of the General Convention of the Byelorussian Autocephalous Orthodox Church in tbe Church of Holy Mother of Zyrovicy, Highland Park, N.J. on May 28, 1972, and put into operation with the signing of the official copy on the first day of January of the year nineteen hundred and seventy six.

14) The validity of the Statute is discussed, infra.

15) The Declaration read as follows:

Your Excellency, Metropolitan Andrew, we would like to declare herewith that the Parish of Holy Spirit BAOC in E. Detroit, Michigan does not recognize Rev. John Brucky as a Bishop of the Byelorussian Autocephalic Orthodox Church for the reasons as follows: Rev. Brucky

was consecrated a Bishop in violation of the Statute of BAOC without the approval of the Council of the Bishops of BAOC; he was consecrated in violation of the canons of the Holy Orthodox Church. He was consecrated in secrecy from the faithful of the BAOC by an outside non-BAOC Metropolitan in an outside non-BAOC church.

Therefore, decisions of the so-called "Council of the Bishops" consisting of the Metropolitan of BAOC and the non-BAOC Bishop Isiaslau (Rev. J. Brucky) without participation of Archbishop of BAOC Mikalay are not binding to our Parish.

Archbishop Mikalay continues to be lawful Senior Hierarch of the BAOC. In response to the resolution and petition of the General Meeting of

the Parish of Holy Spirit in E. Detroit, Michigan which took place October 12, 1980, Archbishop Mikalay issued December 15, 1980 an Archbishopric order through which he took our Parish into his jurisdiction. The Parish considers Archbishop Mikalay its spiritual and administrative leader.

16) Exhibit 16 reads as follows:

It was brought to my attention that on November 6, 1982, you convoked the Council of Byelorussian Autocepalic Orthodox Church. For some reason, only known to you, you omitted six members of the Council for the BAOC including myself. Therefore, I strongly protest your action, and state that any decisions that took place at that illegal meeting are null and void.

17) Paragraph 98 of the Statute reads:

> All real estate, land, church buildings, chapels, other buildings, cemetaries, as well as all movable property and inventory - purchased or donated - funds in bank accounts or cash in current use under the authority and management of the Consistory, Dioceses, Parishes, Missions, and Monasteries which belongs to BAOC jurisdiction is incontestable property of the Byelorussian Autocephalic Orthodox Church.

18) Even while utilizing the "neutral principles analysis," this Court must use strict deference when the relevant documents raise ecclesiastical matters. Deference requires a recognition of the of the hierarchy's governing statutes.

19) See this Order at 2 and accompanying footnotes 4 and 5.